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SHOREWOOD SCHOOL DISTRICT TITLE IX TRAINING

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I. Introduction & Background

A. Overview of Title IX of the Education Amendments of 1972

1. “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681.
2. Examples of types of discrimination covered:
 - a. Sexual harassment;
 - b. Failure to provide an equal opportunity in athletics; and
 - c. Discrimination based on pregnancy.
3. Title IX also prohibits retaliation for filing a complaint under the law with the Department of Education’s Office for Civil Rights (OCR) or for advocating for a right protected by Title IX.
4. The Department of Education’s Office for Civil Rights and the Department of Justice’s Civil Rights Division share enforcement authority over Title IX.

B. The U.S. Supreme Court has analyzed the conditions under which a school district will be held liable for money damages under Title IX for employee-on-student sexual harassment and student-on-student sexual harassment.

1. Employee-on-Student Sexual Harassment

Damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

Gesber v. Lago Vista Independent School District, 524 U.S. 274 (1998).

2. Student-on-Student Sexual Harassment

A school district can be held liable under Title IX for student-on-student harassment if the school acts with deliberate indifference to known acts of harassment in its programs or activities. The harassment must be so severe,

pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

Courts must also bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults. Moreover, that the discrimination must occur 'under any education program or activity' suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education program or activity. A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect, but it is unlikely that Congress would have thought so."

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

- C. Building on the above U.S. Supreme Court analysis and standards, the U.S. Department of Education provided guidance on how schools should respond to reports of sexual harassment under Title IX through a series of non-binding guidance documents, such as 2011 *Dear Colleague Letter* issued by the Obama Administration, which was later withdrawn by the Trump Administration.
- D. The Trump Administration withdrew the 2011 *Dear Colleague Letter*. On May 6, 2020, the Department of Education released its long-awaited Title IX regulations specifying how schools must respond to allegations of sexual harassment in order to comply with Title IX's prohibition against sex discrimination. The new regulations took effect August 14, 2020, and they are currently in effect.
- E. The U.S. Supreme Court issued a decision in *Bostock v. Clayton County, GA*, 590 U. S. ____ (2020). "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."
- F. Trump Administration's OCR issued guidance on the application of *Bostock* to Title IX: Memorandum for Kimberly Richey Acting Assistant Secretary for the Office for Civil Rights Re: *Bostock v. Clayton Cty.* (Jan. 8, 2021) <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>

- G. Biden Administration Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>
- H. Memo from Principal Deputy Assistant Attorney General Pamela Karlan, Civil Rights Division Re: Application of *Bostock* to Title IX (March 26, 2021), available at: <https://www.justice.gov/crt/page/file/1383026/download>
- I. On June 23, 2022, the Biden Administration released proposed changes to the Title IX regulations.

“The goal of the Department’s proposed regulations is thus to fully effectuate Title IX by clarifying and specifying the scope and application of Title IX protections and recipients’ obligation not to discriminate on the basis of sex . . . In addressing confusion about coverage of sex-based harassment in the current regulations, the Department’s proposed regulations also set out requirements that enable recipients to meet their obligations in settings that vary in size, student populations, and administrative structure.”
Unofficial Version of Proposed Rule, p. 12.

- a. The proposed changes do not address Title IX and athletics. The Department of Education will engage in separate rulemaking to address that issue.
- b. Helpful Links:
 - [U.S. Department of Education Fact Sheet](#)
 - [Summary of Major Provisions](#)
 - [Unofficial Version of Proposed Rule](#)
- c. Public comments on the proposed changes may be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>.

II. Overview of Current Title IX Regulations and Proposed Changes

- A. Definition Complainant, Respondent, and Other Key Individuals in the Title IX Complaint Process
 - 1. **Complainant:** An individual alleged to be the victim of conduct that could constitute sexual harassment. 34 CFR 106.30(a).

- a. **Proposed Changes:** The Department proposes moving the definition of “complainant” to § 106.2, referring to “sex discrimination” rather than “sexual harassment,” and removing the term “victim.” The Department also proposes adding language stating that a third-party complainant (i.e., a person other than a student or employee) must be participating or attempting to participate in the recipient’s education program or activity when the alleged sex discrimination occurred. *Unofficial Version of Proposed Rule*, p. 67.
- b. “Examples of possible third-party complainants include a prospective student, a visiting student-athlete, or a guest speaker who is participating or attempting to participate in the recipient’s education program or activity.” p. 69.
2. **Respondent:** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. 34 CFR 106.30(a).
 - a. **Proposed Changes:** The Department proposes defining a “respondent” as an individual who is alleged to have violated the recipient’s prohibition on sex discrimination.
3. **Title IX Coordinator:** Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities. This individual must be referred to as the Title IX Coordinator. The Title IX Coordinator has additional, specific responsibilities throughout the Title IX complaint process, such as the responsibility to receive complaints, assign an investigator, and coordinate and oversee the effective implementation of supportive measures and remedies.
4. **Investigator:** The individual who conducts the investigation, prepares an investigation report, and submits the report to the decision-maker. The investigator is assigned by the Title IX Coordinator. The Title IX Coordinator may assign himself/herself as the investigator.
5. **Decision-maker:** The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. 34 CFR 106.45(7).
 - a. **Proposed Changes:** Allows a single-investigator model. The Title IX Coordinator can serve as the investigator and/or decision-maker under the proposed revisions.

- B. Response to Allegations of Sexual Harassment – General Requirement/Standard: “A recipient [school district] with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond promptly in a manner that is not deliberately indifferent.” 34 CFR 106.44(a).
1. Actual Knowledge
 - a. Current Regulations
 - i. “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to any of the following individuals:
 - Any elementary or secondary school employee;
 - Any Title IX Coordinator; or
 - Any school official with the authority to institute corrective measures. 34 CFR 106.30(a).
 - ii. The standard for actual knowledge is not met if the only school official with actual knowledge is the respondent.
 - b. Department of Education Discussion of Current Regulations

“Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: Witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (*i.e.*, a person alleged to be the victim) or a third party (*e.g.*, the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual allegations; or by any other means.” 30040.
 - c. Notice of Proposed Changes
 - i. “Under proposed § 106.44(c)(1), an elementary school or secondary school recipient would be obligated to require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.” *Unofficial Version of Proposed Rule*, p. 173.

ii. Confidential Employee Exception:

- “Proposed § 106.44(d) would make clear that an employee covered by the definition of “confidential employee” in proposed § 106.2 would not be required to notify the Title IX Coordinator when a person informs them of conduct that may constitute sex discrimination under Title IX. Instead, proposed § 106.44(d) would require a recipient to notify all participants in the recipient’s education program or activity of the identity of its confidential employees, if any, and require that a confidential employee, in response to a person who informs that employee of conduct that may constitute sex discrimination under Title IX, explain their confidential status and provide that person with the contact information of the recipient’s Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX.” p. 189.
- The proposed definition of “confidential employee” would include employees in three categories: (1) employees whose communications are privileged under Federal or State law associated with their role or duties for the institution; (2) employees whom the recipient has designated as a confidential resource for the purpose of providing services to individuals in connection with sex discrimination. If the employee also has a role or duty that is not associated with providing these services, the employee’s status as confidential would be limited to information received about sex discrimination in connection with providing these services; and (3) N/A to K-12 schools. p. 190.

2. Sexual Harassment

a. Current Regulations

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- i. Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal access to the recipient’s education program or activity;

- ii. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);

OR

- iii. Sexual assault, dating violence, domestic violence, or stalking. 34 CFR 106.30(a).

b. Notice of Proposed Changes

“The proposed definition of “sex-based harassment” would clarify that it covers sexual harassment, harassment on the bases described in proposed § 106.10, and other conduct on the basis of sex that is in one or more of the following categories:

- i. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or implicitly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
- ii. Unwelcome sex-based conduct that is sufficiently severe **or** pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment);

OR

- iii. Sexual assault; dating violence; domestic violence; or stalking.”

3. Education Program or Activity

a. Current Regulations

“Education program or activity’ includes locations, events, or circumstances over which the recipient exercised substantial control over the respondent and the context in which the sexual harassment occurs.” 34 CFR 160.44(a).

- b. Notice of Proposed Changes
 - i. “The proposed regulations would make clear that conduct that occurs under a recipient’s education program or activity includes but is not limited to conduct ... that is subject to the recipient’s disciplinary authority.”
 - ii. “It would also specify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient’s education program or activity or outside the United States.”
 - iii. “Finally, the Department proposes eliminating the language in current § 106.44(a) that defines ‘education program or activity’ for purposes of sexual harassment to ensure that the term is applied uniformly throughout the regulations for all forms of sex discrimination, including sex-based harassment.” *Unofficial Version of Proposed Rule*, p. 43.

4. Person in the United States

a. Current Regulations

These requirements “apply only to sex discrimination occurring against a person in the United States.” 34 CFR 106.8(d).

b. Proposed Changes

“Would specify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient’s education program or activity or outside the United States.” *Unofficial Version of Proposed Rule*, p. 43.

5. Deliberate Indifference

a. Regulations

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” 34 CFR 106.44(a).

b. Proposed Changes

“Proposed § 106.44(a) states that a recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or 157 activity, prevent its recurrence, and remedy its effects.”

C. Response to Allegations of Sexual Harassment

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in 106.30 to a complainant, and by following a grievance process that complies with 106.45 before the imposition of any disciplinary sanctions, or other actions that are not supportive measures as defined in 106.30, against a respondent.” 106.44(a).

1. Report of Sexual Harassment & Supportive Measures

a. Regulations

- i. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in 106.30, *with or without the filing of a formal complaint*, discuss the complainant’s wishes with respect to supportive measures, and explain the process for filing a formal complaint.
- ii. “Supportive measures” means non-disciplinary, non-punitive, individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant and respondent before or after the filing of a formal complaint or where no such complaint has been filed.
- iii. Such measures must be designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.
- iv. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, mutual restrictions on contact between the parties, leaves of absence, etc.

b. Notice of Proposed Changes

i. Proposed § 106.44(f) states that a recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX:

- Treat the complainant and respondent equitably;
- Notify the complainant of the grievance procedures as described in proposed § 106.45, and if a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of the informal resolution process as described in this section if available and appropriate;
- Offer and coordinate supportive measures as described in proposed § 106.44(g), as appropriate, to the complainant and respondent to restore or preserve that party's access to the recipient's education program or activity;
- In response to a complaint, initiate the grievance procedures or informal resolution process under § 106.44(k) as described in proposed § 106.45, and if applicable proposed § 106.46;
- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures described in proposed § 106.45, and if applicable proposed § 106.46, if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity; and
- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant."

Unofficial Version of Proposed Rule, p. 199-200.

ii. "The Department also proposes adding a requirement at § 106.44(b) that a recipient must require its Title IX Coordinator to monitor barriers in the recipient's education program or activity to reporting information about conduct that may constitute sex discrimination under Title IX, and then the recipient must take

steps reasonably calculated to address barriers that have been identified.” *Unofficial Version of Proposed Rule*, p. 168.

2. Formal Complaint Alleging Sexual Harassment

a. Current Regulations

- i. “In response to a formal complaint, a recipient must follow a grievance process that complies with 106.45.” 34 CFR 106.44(b).
- ii. “Formal complaint” means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 CFR 106.30(a).
- iii. At the time of filing the formal complaint, the complainant must be participating in or attempting to participate in the education program or activity of the recipient. 34 CFR 106.30(a).
- iv. Upon receiving a formal complaint, a recipient must provide the following written notice to the parties (if known):
 - Notice of the grievance process, including any informal resolution process.
 - Notice of the allegations of sexual harassment, including sufficient details known at the time, and with sufficient time to prepare a response before any initial interview. Sufficient details include the identity of the parties involved in the incident (if known), a description of the alleged conduct, and the date and location of the alleged incident (if known).
 - The written notice must include a statement that the respondent is presumed to not be responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 - The written notice must inform the parties that they may have an advisor of their choice, who may be an attorney, and may inspect and respond to evidence obtained during the investigation that is directly related to the allegations.
 - The written notice must inform the parties of any provision in the code of conduct that prohibits making false statements or

knowingly submitting false information during the grievance process.

- If, in the course of the investigation, the recipient decides to investigate allegations that are not included in the notice, notice of the additional allegations must be provided to the parties. 34 CFR 106.45(b)(2).

c. Proposed Changes to Written Notice Requirement

“The Department proposes keeping the same elements currently required for written notice of the informal resolution process and would add requirements that provide the parties with more detailed information about what an informal resolution process would entail. This would include, in proposed § 106.44(k)(3), the types of potential terms that the parties might voluntarily agree to as a part of an informal resolution process, including, among others, restrictions on contact.”

d. Participating or attempting to participate in the recipient’s education programs or activities

i. Department of Education Discussion of Current Regulations

“ A complainant who has graduated may still be “attempting to participate” in the recipient’s education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient’s alumni programs and activities. Similarly, a complainant who is on a leave of absence may be “participating or attempting to participate” in the recipient’s education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still “attempting to participate” even while on a leave of absence. By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is “attempting to participate” in the recipient’s education program or activity.” 30138

ii. Proposed Changes:

“ Under proposed § 106.45(a)(2)(iv), a third party must be participating in or attempting to participate in the recipient’s

education program or activity in order to make a complaint requesting that the recipient initiate grievance procedures . . . The Department’s proposed regulations would also shift the focus from whether the third party was participating or attempting to participate in the recipient’s education program or activity at the time the complaint was filed to whether the third party was participating or attempting to participate in the recipient’s education program or activity when the alleged sex discrimination occurred.” *Unofficial Version of Proposed Rule*, p. 75-76.

3. Dismissal of formal complaint

a. Current Regulations

i. Mandatory dismissal

The formal complaint must be dismissed *for Title IX purposes only* if the alleged conduct:

- Would not constitute sexual harassment as defined in 106.30 even if proved;
- Did not occur in the recipient’s education program or activity; or
- Did not occur against a person in the United States.

ii. Permissive dismissal

The complaint may be dismissed at any time during the investigation if:

- The complainant notifies the Title IX Coordinator that they would like to withdraw the complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the recipient; or
- Specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination. 34 CFR 106.45(b)(3).

- b. Notice of Proposed Changes
 - i. The Department proposes eliminating “mandatory dismissal,” leaving all dismissals to be “permissive” for the following reasons:
 - The complainant notifies the Title IX Coordinator that they would like to withdraw the complaint or any allegations therein;
 - The respondent is no longer enrolled or employed by the recipient;
 - Specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination; or
 - Would not constitute sexual discrimination under Title IX even if proven.

D. Informal Resolution

1. Current Regulations

- a. Informal resolution may not be offered unless a formal complaint is filed.
- b. Informal resolution may not be offered or facilitated if the allegations involve an employee’s sexual harassment of a student.
- c. The parties may not be required to participate in informal resolution or waive their right to an investigation and adjudication under the grievance process.
- d. At any time prior to reaching a determination regarding responsibility, the recipient may facilitate an informal resolution process (e.g., mediation or restorative justice) that does not involve a full investigation and adjudication, provided that the recipient:
 - i. Provides to the parties a written notice disclosing:
 - The allegations, the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;

- That at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

ii. Obtains the parties' voluntary, written consent to the informal resolution process. 34 CFR 106.45(b)(9).

2. Notice of Proposed Changes

- a. The Department proposes adding § 106.44(k)(1), which would specify that a recipient may offer an informal resolution process at any time prior to determining whether sex discrimination occurred, unless there are allegations that an employee engaged in sex discrimination toward a student *or* such a process would conflict with Federal, State, or local law.
- b. Proposed § 106.44(k)(1) would also state that a recipient that provides an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

E. Grievance Process - Basic Requirements

1. Current Regulations

- a. The grievance process must be followed before imposition of any disciplinary sanctions or other actions that are not supportive measures.
- b. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. The remedies may overlap with the supportive measures, but the remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.
- c. Must require the objective evaluation of all relevant evidence—inculpatory and exculpatory.

- d. Must provide that credibility determinations may not be based on a person's status as complainant, respondent, or witness.
 - e. Must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
 - f. Must include reasonably prompt time frames for the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes, if the recipient offers informal resolution. Must also include a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities." 34 CFR 106.45(b)(1).
 - g. Must describe the range of possible disciplinary sanctions and remedies following any determination of responsibility.
 - h. Must state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or clear and convincing standard.
 - i. Must describe the range of supportive measures available to both parties.
 - j. Must include the procedures and permissible bases for the complainant or respondent to appeal.
2. Notice of Proposed Changes
- a. Under the proposed regulations, all recipients would be required to adopt grievance procedures in writing (proposed § 106.45(a)(1)) that incorporate the requirements of proposed § 106.45, including the following:
 - i. Equitable treatment of complainants and respondents. (Proposed § 106.45(b)(1))
 - ii. Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias. (Proposed § 106.45(b)(2))

- iii. Decisionmaker may be the same person as the Title IX Coordinator or investigator. (Proposed § 106.45(b)(2))
- iv. A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures. (Proposed § 106.45(b)(3))
- v. Reasonably prompt timeframes for all major stages. (Proposed § 106.45(b)(4))
- vi. Reasonable steps to protect privacy of parties and witnesses. (Proposed § 106.45(b)(5))
- vii. Objective evaluation of relevant and not otherwise impermissible evidence. (Proposed § 106.45(b)(6)- (7))
- viii. Notice of the allegations to the parties. (Proposed § 106.45(c))
- ix. Dismissals permitted in certain circumstances, but not required. (Proposed § 106.45(d))
- x. Consolidation permitted for complaints arising out of the same facts or circumstances. (Proposed § 106.45(e))
- xi. A process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant. (Proposed § 106.45(g))
- xii. Clear processes for the determination of whether sex discrimination occurred (Proposed § 106.45(h))
- xiii. Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient. (Proposed § 106.45(j))
- xiv. Grievance procedures must describe the range of possible supportive measures and a range or list of disciplinary sanctions and remedies for sex-based harassment complaints. (Proposed § 106.45(k))

F. Investigation Stage

1. Current Regulations

- a. Both parties must be provided with an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- b. The parties' ability to discuss the allegations under investigation or gather relevant evidence may not be restricted.
- c. The parties must be provided with the same opportunity to have others present during any grievance proceeding and any related meeting, including an attorney.
- d. The parties and witnesses must be provided with written notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time for the party to prepare.
- e. Both parties must be provided with an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
- f. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response. The investigator must consider the response of both parties prior to completion of the investigative report.
- g. The investigator must prepare an investigative report that fairly summarizes relevant evidence. At least 10 days prior to a hearing (if applicable) or other time of determination regarding responsibility, the report must be sent to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response.

2. Department of Education Discussion of Current Regulations
 - a. No “Gag Orders”

“As to this provision’s requirement that a recipient not restrict a party’s ability to discuss the allegations under investigation, the Department believes that a recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. Many commenters have observed that the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults “on their own” for the first time, and many of whom in the elementary and secondary school context are minors.

The Department does not believe recipients should render parties feeling isolated or alone through the grievance process by restricting parties’ ability to seek advice and support outside the recipient’s provision of supportive measures. Nor should a party face prior restraint on the party’s ability to discuss the allegations under investigation where the party intends to, for example, criticize the recipient’s handling of the investigation or approach to Title IX generally. The Department notes that student activism, and employee publication of articles and essays, has spurred many recipients to change or improve Title IX procedures, and often such activism and publications have included discussion by parties to a Title IX grievance process of perceived flaws in the recipient’s Title IX policies and procedures. The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties’ ability to discuss “the allegations under investigation.” This provision does not, therefore, apply to discussion of information that does not consist of “the allegations under investigation” (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).

As to the requirement in § 106.45(b)(5)(iii) that recipients must not restrict parties’ ability “to gather and present evidence,” the purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the

outcome of the case. This provision helps ensure that other procedural rights under § 106.45 are meaningful to the parties; for example, while the parties have equal opportunity to inspect and review evidence gathered by the recipient under § 106.45(b)(5)(vi), this provision helps make that right meaningful by ensuring that no party's ability to gather evidence (e.g., by contacting a potential witness, or taking photographs of the location where the incident occurred) is hampered by the recipient.

Finally, the two requirements of this provision sometimes overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary precisely so that the party can "gather and present evidence," for example to seek advice from an advocacy organization or explain to campus security the need to access a building to inspect the location of an alleged incident.

3. Notice of Proposed Changes

- a. Burden is on the recipient to gather sufficient evidence. (Proposed § 106.45(f)(1))
- b. Equal opportunity for all parties to present relevant fact witnesses and other evidence. (Proposed § 106.45(f)(2))
- c. Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible. (Proposed § 106.45(f)(3))
- d. A description provided to the parties by the recipient of the relevant and not otherwise impermissible evidence, as well as a reasonable opportunity to respond. (Proposed § 106.45(f)(4))

G. Decision-Making/Determination of Responsibility Stage

1. Current Regulations

- a. The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.
- b. The written determination must include:
 - i. A description of the allegations potentially constituting sexual harassment as defined in 106.30.

- ii. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
 - iii. Findings of fact supporting the determination.
 - iv. Conclusions regarding the application of the recipient's code of conduct to the facts.
 - v. The decision and rationale as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and the recipient's procedures and permissible bases for the complainant and respondent to appeal.
 - vi. The written determination must be provided to the parties simultaneously.
 - vii. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
 - viii. The Title IX Coordinator is responsible for effective implementation of any remedies.
2. Notice of Proposed Changes
- “Proposed § 106.45(f)(3) would require a recipient to review all evidence gathered through the investigation and determine which evidence is relevant and which evidence is impermissible regardless of relevance, consistent with proposed §§ 106.2 and 106.45(b)(7).

H. Appeals

1. Current Regulations

a. Circumstances in which an opportunity to appeal *must* be offered:

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

- i. Procedural irregularity that affected the outcome of the matter;
- ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- iii. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

b. Circumstances in which an opportunity to appeal *may* be offered:

A recipient may offer an appeal equally to both parties on additional bases.

c. As to all appeals, the recipient must:

- i. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- ii. Ensure that the decision-maker(s) for the appeal is not the same person(s) as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- iii. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- iv. Issue a written decision describing the result of the appeal and the rationale for the result; and
- v. Provide the written decision simultaneously to both parties. 34 CFR 106.45(b)(8).

I. Emergency Removal

1. Current Regulations

- a. “Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1972, or the Americans with Disabilities Act.” 34 CFR 106.44(c).
- b. “Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process . . .” *Id.*

2. Department of Education Discussion

- a. “Changing a respondent’s class schedule . . . may be a permissible supportive measure depending on the circumstances. By contrast, removing a respondent from the entirety of the education program or activities (such as removal from a team, club, or extracurricular activity), likely would constitute an unreasonable burden on the respondent or be deemed disciplinary or punitive, and therefore would not likely qualify as a supportive measure. Until or unless the recipient has followed the § 106.45 grievance process (at which point the recipient may impose any disciplinary sanction or other punitive or adverse consequence of the recipient’s choice), removals of the respondent from the recipient’s education program or activity need to meet the standards for emergency removals under § 106.44(c).” 30231.
- b. “Nothing in 106.44(c) prevents a recipient from involving a student’s IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient’s discretion to remove the respondent is constrained by IDEA requirements.” 30229.

J. Administrative Leave

Section 106.44(d) states that “nothing in this subpart precludes a recipient from placing a non-student-employee respondent on administrative leave during the pendency of a grievance process” consistent with current § 106.45, provided that in doing so a recipient must not modify any rights available to a respondent under Section 504 or the ADA.

K. Training

1. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates and informal resolution process, receive training on:
 - a. The definition of sexual harassment in 106.30;
 - b. The scope of the recipient’s education program or activity;
 - c. How to conduct an investigation;
 - d. The grievance process, including hearings, appeals, and informal resolution processes, as applicable;
 - e. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
2. Decision-makers must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant.
3. Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.
4. All training materials must be made publicly available on the recipient’s website.

III. Pregnancy and Parental Status Discrimination: Notice of Proposed Changes

- A. The proposed regulations would clarify that recipients must protect students and employees from discrimination based on pregnancy or related conditions (defined in proposed § 106.2), including by providing reasonable modifications for students, (proposed § 106.40(b)(3)(ii) and (b)(4)), reasonable break time for employees for

lactation (proposed § 106.57(e)(1)), and lactation space for both students and employees (proposed §§ 106.40(b)(3)(iv) and 106.57(e)(2)).

- B. The proposed regulations would also modernize and clarify Title IX’s longstanding prohibition against treating parents differently on the basis of sex, including by defining “parental status” to include, e.g., adoptive or stepparents, or legal guardians). (Proposed § 106.2) Under the proposed regulations, a recipient would be required ensure that when a student (or a student’s parent, guardian, or authorized legal representative) tells a recipient’s employee of the student’s pregnancy or related conditions, the employee must provide information on how to contact the Title IX Coordinator for further assistance. (Proposed § 106.40(b)(2)).
- C. Once a student or the student’s representative notifies the Title IX Coordinator, the Title IX Coordinator must:
 - 1. Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient’s education program or activity. (Proposed § 106.40(b)(3)(ii) and (b)(4))
 - 2. Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return. (Proposed § 106.40(b)(3)(iii))
 - 3. Provide the student a clean, private space for lactation. (Proposed § 106.40(b)(3)(iv))
- D. A recipient would be required to provide its employees with reasonable break time for lactation, as well as a clean and private lactation space. (Proposed § 106.57(e)(1)-(2))

IV. Title IX’s Application to LGBTQI+ Individuals

A. Current Regulations

“When the Department amended the Title IX regulations in May 2020, it declined to address Title IX’s coverage of discrimination on the basis of gender identity or sexual orientation.” 85 FR at 30178. *Unofficial Version of Proposed Rule*, 514-515.

B. Proposed Changes:

1. The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by:
 - a. Prohibiting . . . policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2)).
 - b. The Department will engage in a separate rulemaking to address Title IX’s application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students’ eligibility to participate on a particular male or female athletic team.
 - c. Title IX’s broad prohibition on discrimination “on the basis of sex” under a recipient’s education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person’s sex. *Unofficial Version of Proposed Rule*, 522.
2. **Gender Identity.** “Proposed § 106.10 would also clarify that Title IX prohibits discrimination on the basis of an individual’s gender identity . . . The proposed regulations are consistent with OCR’s 2021 Bostock Notice of Interpretation and the interpretation of Federal courts that have applied Bostock to Title IX.” 525.
3. **Sex stereotypes.** Proposed § 106.10 would clarify that discrimination based on sex stereotypes, i.e., fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex, is prohibited under Title IX. The proposed regulations would codify the long-recognized principle that Title IX and other sex discrimination laws prohibit harassment and other forms of discrimination based on a person’s conformity or nonconformity to stereotypical notions of masculinity and femininity. As the Supreme Court explained in *Price Waterhouse v. Hopkins*, the assumption that persons must act and dress in a particular way based on expectations related to a person’s sex is a form of discrimination on the basis of sex. 526.

V. Lessons Learned from Recent OCR Resolutions Enforcing Current Title IX Regs

OCR Complaint No. 09-17-1537:

“Once the district has notice of a hostile environment, it must take appropriate and effective action whether or not the student who was subjected to a hostile environment makes a complaint or otherwise asks the district to take action. So long as a responsible employee received notice, that notice will be imputed to the district.

OCR Complaint No. 11-17-1502:

“In cases where an employee is engaged in sexual harassment of a student, a school may be held responsible under Title IX regardless of whether it knew or should have known about the harassment. Specifically, if an employee, in the context of carrying out his or her day-to-day job responsibilities for providing aid, benefits or services to students, engages in harassment that denies or limits a student’s ability to participate in or benefit from the school’s program, the school is responsible for discrimination, whether or not it knew or should have known about it.

The following factors are considered in determining whether an employee has engaged in harassment in the context of the employee’s provision of aid, benefits or services to students:

1. The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aid, benefits, or services to students, to direct and control student conduct, or to discipline students generally;
2. The degree of influence the employee has over the particular student involved, including the circumstances in which the harassment took place;
3. Where and when the harassment occurred;
4. The age and educational level of the student involved; and
5. As applicable, whether, in light of the student’s age and educational level and the way the school is run, it would be reasonable to believe that the employee was in a position of responsibility over the student, even if the employee was not.

The school is therefore also responsible for equitably remedying any effects of the harassment on the students, as well as for ending the harassment and preventing its recurrence. As noted above, this is true whether or not the school has “notice” of the harassment.”

OCR Case No. 15-22-1222:

“During its investigation to date, OCR reviewed information provided by the District. The information reviewed by OCR showed that, with respect to the District’s Title IX grievance procedures and identified coordinator, there was a lack in consistency between the District’s Board Policies and the information provided in the District’s building handbooks. While reviewing the District’s handbooks, OCR also noted a similar concern regarding the District’s Section 504 and Title II Board Policies and the building handbooks.”

OCR Case No. 11-21-1356:

“OCR has concerns that the District separated students based on sex without justification by holding assemblies only for female students to discuss hygiene issues and dress code enforcement. OCR also has concerns that the School may be treating female students differently than male students in its enforcement of the dress code, based on the School’s separation of students by sex for the assemblies and prioritization of assemblies for girls; a school employee’s comment during the 8th grade assembly about girls “saving leggings for marriage” and the School Principal’s effort to justify the employee’s inappropriate comment; and warnings during the girls-only assemblies that students would be suspended for dress code violations, which appears to conflict with the dress code’s statement that schools should require compliance with the code “with the least amount of disciplinary action.” Although the District planned assemblies for male students that it then cancelled due to parent concerns raised about the assemblies, OCR to date did not see evidence that the School ever advised male students that dress code violations might result in suspension.”

PART TWO: How to Conduct Investigations and Remain Impartial

I. How to Conduct an Investigation

A. Who Conducts an Investigation

1. The Title IX Coordinator may begin the investigation or will designate a specific individual to conduct the investigation.
 - a. Someone who works for the District.
 - b. District's in-house counsel.
 - c. District's primary outside counsel.
 - d. Another attorney in the firm of the District's outside counsel.
 - e. An attorney from another firm other than that of outside counsel.
 - f. An administrator from another school district.
 - g. A retired administrator.
 - h. An independent investigator.
2. Depending on the individuals involved and the nature/complexity of the complaint, consider using a third party or legal counsel to conduct the investigation. When the investigator is an attorney retained to provide legal advice, advise witnesses of this fact, and tell them that the investigator represents the employer only and that the investigation is being conducted for the purpose of obtaining or rendering legal advice
3. The District May need to report conduct to the police under mandatory reporting laws, or to DPI under Wis. Stat. § 115.31. The District should still conduct its own investigation even if law enforcement is involved.

B. Who to Interview

1. Interview the Complainant (generally done when obtaining the complaint, but follow up may be needed).

2. Interview the Accused/Respondent (usually last).
3. Interview any other witnesses who may reasonably be expected to have any information relevant to the allegations.
4. It is not necessary to interview everyone identified by Complainant and Respondent.
5. The more people spoken to, the higher risk of privacy interests being affected, but there should be sufficient interviews of witnesses in order to fairly assess the situation and corroborate the statements of parties and witnesses.

C. General Guidelines for Conducting Interviews

1. It is important to set the appropriate tone and maintain control over the flow of the interview. The first few minutes and what is said are critical to achieving these goals. Investigators should carefully craft or script the introduction. Explain your role in the process as a fact finder and that no conclusions of any kind have been initiated or made.
2. Conduct the interview in private.
3. Consider having a second individual in the room to confirm what was said.
4. Take detailed notes of the interview or have someone else take the notes. Explain that notes will be taken and used to create a final report.
5. Ask if the person has any questions and confirm an understanding of the information shared before proceeding. It is important to ask throughout the interview, especially lengthier ones, if there are any questions.
6. Ask the following types of questions and remind the witness that detailed, accurate information is necessary for a thorough investigation.
 - a. Who was involved in the conduct?
 - b. What did he/she witness first hand?
 - c. When (date and time)?
 - d. Where did the alleged conduct occur?

- e. How many times did the conduct occur?
 - f. Were there any other witnesses?
 - g. What led up to the incident?
 - h. Were others involved?
 - i. Have witnesses discussed the incident with anyone else or reported the incident to anyone else? If so, to whom and with what result?
 - j. Is there any physical evidence?
 - k. Is there anything else I should know or be aware of?
 - l. Is there anyone else I should talk to? Any documents, emails, or other physical information I should see?
 - m. Is there anything you thought I would ask today, but didn't?
7. Avoid leading questions.
 8. Avoid asking multiple choice (i.e., either/or questions). Ask what happened. ("Can you describe?"). Start open ended and then narrow down based on what you know.
 9. Focus on factual matters; find out if any information from the witness is based on rumor or hearsay.
 10. If new information is presented, follow it. Ask questions. Go off script.
 11. At the conclusion of the interview, summarize what the witness told you. (So, what I'm hearing you say...) Ask if your reiteration is accurate. Depending on situation ask witness to put statement in writing or provide written summary and ask witness to sign as accurate. (e.g., if worried about changing story).
 12. Inform the witness that the information discussed during the interview must be kept confidential.

13. Let the witness know that a second conversation may be required depending on how the investigation unfolds. Provide contact information for the witness to use should additional recollections occur after the interview.
14. Advise the witness that they cannot be retaliated against for participation in an investigation, and that any such retaliation should be reported immediately.

D. Gathering Relevant Information

1. “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Wis. Stat. § 904.01.
2. Relevant questions are designed to draw out facts.
3. Rape Shield Protections: Questions or evidence related to the complainant’s prior sexual history are not relevant unless otherwise offered to prove (1) that someone other than the respondent committed the alleged conduct or (2) consent.

E. Interviewing the Complainant

1. Obtain a detailed account of all conduct that the reporting party is concerned about:
 - a. Who is the subject of the report?
 - b. What was the conduct?
 - c. When did the conduct occur?
 - d. Where did the conduct occur?
 - e. Who else was present?
 - f. How did the reporting party become aware of the alleged misconduct? Does the reporting party have first-hand knowledge or is their knowledge based on hearsay?

- g. Does the reporting party have any documentation pertaining to the alleged misconduct?
 2. Advise the reporting party that you take such concerns seriously (even if you think there is little or no validity to the complaint).
 3. Advise the reporting party that you cannot guarantee absolute confidentiality, including that the subject of the report has the right to respond to allegations. Note that you will keep things as confidential as practicable, given your responsibility to investigate and take any necessary action.
 4. Inform the reporting party that even if s/he does not want you to pursue investigating that you may be obligated to investigate the matter, especially in the case of alleged discrimination, harassment, or retaliation.
 5. Let the reporting party know that you will contact them if/when you need additional information or when the investigation is completed.

F. Interviewing the Respondent

1. Determine whether s/he has representation and describe the role of representation in the interview as an observer and consultant who is not permitted to interfere with or disrupt the interview BUT may advise the respondent as to how and whether to answer specific questions.
2. Garrity Warning: If the alleged misconduct involves possible criminal conduct by an employee who is the subject of the investigation, give this warning to the employee, and have the employee sign prior to conducting the investigatory interview. Provide a copy to the employee. The Garrity warning assures the employee that the answers/responses given during the investigation cannot be used in any criminal investigation unless the disclosure of the answers/responses is compelled by a court. As a result, the employee cannot invoke the Fifth Amendment and refuse to answer questions asked during the interview.
3. Tell the individual the nature of the alleged complaint/concern/behavior/allegations.
4. Provide the respondent with the opportunity to tell his/her side and respond to all allegations.

5. If the respondent claims that the allegations are false, ask why the complainant might lie.
6. Observe subject's reaction/demeanor.
7. Be direct and fair.
8. Remain objective, seek facts.
9. Subject may ask questions that pertain to his/her own situation.
10. Tone of meeting should be formal.
11. What to avoid when meeting with the subject.
 - a. Sympathizing or becoming an ally of the subject of the investigation. ("You don't have anything to worry about." "This is just a formality.")
 - b. Interrupting person during his/her response.
 - c. Becoming confrontational/argumentative/defensive.
 - d. Focusing on feelings rather than fact. It is easy to become distracted by tears or anger. Allow the person time to compose themselves and then continue with the interview.
 - e. Bargaining with the individual.
 - f. Discussing side issues or motives.
 - g. Discussing other individuals. Subject will often want to ask, "Why me?"

G. Interviewing Third Parties

1. What did you see or hear? When did this occur? Describe the respondent's behavior toward the complainant and toward others.
2. What did the complainant tell you? When did s/he tell you this?
3. Do you know of any other relevant information?

4. Are there other persons who have relevant information?

H. Review other documents.

1. Prior disciplinary action
2. Applicable student records
3. Employee performance evaluations.
4. Any acknowledgment of receipt of rules or handbooks
5. Identify documents that confirm facts (timecards, computer records, attendance records, email records, etc.)

I. Drafting the Investigation Report

1. Date and description of the complaint/allegations.
2. A summary of the scope of the investigation and relevant policies/procedures.
3. Summarize investigation process, including statements to witnesses in the introductory and concluding remarks.
4. The report should include an explanation for any delays, supporting rationales in determining who to interview or not interview, whether the investigation revealed other allegations, and how those allegations were handled.
5. A summary of the evidence gathered through the interviews and review of documentation and other tangible evidence.
6. A summary of findings, explanation of resolving credibility disputes, and a conclusion based on the investigator's application of the preponderance of evidence standard.
7. Explain the reasoning behind findings and credibility factors.
8. The report may note that conclusion can not be reached. Allegations are substantiated or not substantiated. This is NOT a determination of responsibility. Only the decision-maker's written determination is final.

9. The investigation report may contain recommendations as to remedies, disciplinary sanctions, and other corrective measures, but will not be final until the decision-maker drafts a written determination.

J. Confidentiality

1. The District is prohibited from issuing “gag orders” to the parties
 - a. A recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss (i.e., speak or write about) the allegations under investigation, with others (e.g., a parent, friend, or other source of emotional support, or with an advocacy organization).
 - b. This provision applies only to discussions of “the allegations under investigation,” meaning if a complainant reports sexual harassment but no formal complaint is filed, the District has discretion to impose non-disclosure or confidentiality requirements on complainants and respondents.

K. Assessing Credibility

1. Standard of analysis
 - a. Conclude the investigation when the investigator gathers a sufficient amount of information to permit making a conclusion. Abandon the notion that the truth will always be uncovered.
 - b. Generally, “preponderance of the evidence” is the appropriate standard. Is it more likely than not that the complained of conduct occurred? If a quality investigation has been conducted, a reasonable, fair, and good faith conclusion can be made.
 - c. A conclusion can and, in most cases should, still be reached even if the accused does not admit to the conduct or if there are no witnesses other than the complainant. The credibility of statements made by the complainant and the accused can and should be weighed against each other. Circumstantial evidence and factors impacting the parties’ credibility should be considered.

2. Factors to Assess Credibility:
 - a. Corroboration: Reliable documents, physical evidence, statements made by others.
 - b. Observations.
 - c. Quality of recollection.
 - d. Statements: Consistency, reliability, credibility, contradictions.
 - e. Bias/Interests/Motives.
 - f. Plausibility.
 - g. Background, history, pattern.
 - h. Character/reputation.
 - i. Demeanor/attitude.

II. How to Serve Impartially

1. Avoid prejudgment of the facts at issue.
2. Avoid conflicts of interest.
3. Fairly and objectively gather and consider evidence.
4. Make a decision based on the evidence gathered during the investigation, not preconceptions or predeterminations.
5. Treat all witnesses with the same amount of respect, regardless of their position as complainant, respondent, or third party.